Editor's note: 95 I.D. 314

UNITED STATES OF AMERICA
v.
VERNARD E. JONES

COOK INLET REGION, INC.
NONDALTON NATIVE CORP.
NONDALTON CITY COUNCIL
NONDALTON VILLAGE COUNCIL
INTERVENORS

IBLA 87-59 Decided December 29, 1988

Appeal from a decision of an Administrative Law Judge holding homesite claim AA-85 invalid.

Reversed and remanded.

1. Administrative Procedure: Generally--Appeals: Generally--Board of Land Appeals--Public Lands: Jurisdiction Over--Res Judicata--Rules of Practice: Generally--Secretary of the Interior--Stare Decisis

Under the principle of stare decisis, prior Depart-
mental decisions are binding precedent, but may be overruled when found to be erroneous. Under the principle of administrative finality, a decision of an
agency official may not be reconsidered after a party has been given an opportunity to obtain review within

the Department and did not seek review, or appealed
and the decision was affirmed. However, as a matter administrative authority, so long as title to land of affected by a decision remains within the Depart-
ment, an erroneous decision may be corrected.

2. Act of June 8, 1906

The Antiquities Act is not self-executing and does
not withdraw land other than by a formal determination issued by Presidential proclamation affecting a specific parcel of land.

3. Act of June 8, 1906

A person who makes an "appropriation" of land by complying with the public land laws does not, by this action alone, "appropriate" under 16 U.S.C. | 433 (1982) objects of antiquity which may exist on that land.

4. National Historic Preservation Act: Generally

The NHPA is essentially a procedural, action-forcing statute designed to ensure that cultural resources
are identified and considered in the decision-making process. It does not provide for a veto or absolute bar to Federal undertakings which may adversely affect such resources. Whatever procedures the NHPA may require BLM to follow in reviewing a homesite application, the fact they must be undertaken neither invalidates the application nor necessitates its rejection.

5. Act of March 3, 1891--Alaska: Homesites--Applications and Entries: Generally--Contests and Protests: Generally--Conveyances: Generally--Patents to Public Lands: Generally

Under the Confirmation Act, 43 U.S.C. | 1165 (1982), 2 years from the date of issuance of a "receipt upon the final entry" an entryman acquires a right to a patent if there is "no pending contest or protest." The statute's wording does not provide for any exception and the Department cannot defeat a right by creating an exception to its application.

6. Act of March 3, 1891--Alaska: Homesites--Applications and Entries: Generally--Indians: Alaska Natives: Generally--Conveyances: Generally--Patents to Public Lands: Generally

Supreme Court decisions that the statute of limitations for initiating suits to vacate and annul patents,

43 U.S.C. | 1166 (1982), does not preclude suits by the United States to annul patents issued in alleged violation of rights of its Indian wards do not apply to permit contest proceedings if the Department is precluded from bringing a contest by the Confirmation Act, 43 U.S.C. | 1165 (1982). The Confirmation Act transfers to the courts authority over controversies arising after the 2-year period has passed, and gives the patentee the protection of a judicial forum.

7. Act of March 3, 1891--Alaska: Homesites--Applications and Entries: Generally--Contests and Protests: Generally

A protest of the acceptance of a notice of location of a homesite which was rejected on appeal could not constitute a protest against approval of an application to purchase filed 3 years later. Until the application to purchase was filed, there could be no final entry to which the Confirmation Act, 43 U.S.C. | 1165 (1982), could apply and, correspondingly, the protest could not be a "protest against the validity of such entry" so as to preclude application of the Act.

8. Act of March 3, 1891--Alaska: Homesites--Applications and Entries: Generally--Contests and Protests: Generally

A field investigation report prepared by BLM is not a protest.

9. Act of March 3, 1891--Alaska: Homesites--Applications and Entries: Generally--Contests and Protests: Generally--Conveyances: Generally--Patents to Public Lands: Generally

The Confirmation Act, 43 U.S.C. | 1165 (1982), does not apply when the applicant has not tendered payment for the land and a receipt has not been issued.

10. Alaska: Alaska Native Claims Settlement Act--Alaska: Possessory Rights--Alaska Native Claims Settlement Act: Aboriginal Claims

With the exception of the rights specifically granted or retained by that Act, Sec. 4 of ANCSA, 43 U.S.C. | 1603 (1982), extinguished all forms of aboriginal title however characterized or described. Its three subsections apply to abolish aboriginal title regardless of whether such title is described in terms of right, title, possession, use, or occupancy.

11. Alaska: Alaska Native Claims Settlement Act--Alaska: Possessory Rights--Alaska Native Claims Settlement Act: Aboriginal Claims--Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Generally

The phrase "statute or treaty" in subsec. 4(c) of ANCSA, 43 U.S.C. | 1603(c) (1982), applies to all statutes "relating to Native use and occupancy." However, sec. 4 does not extend to extinguish vested rights acquired under statute prior to ANCSA's enactment. Rights acquired by virtue of compliance with statutory provisions are not claims based on aboriginal use and occupancy but property rights created by Congress.

12. Alaska: Alaska Native Claims Settlement Act--Alaska: Homesites--Alaska: Possessory Rights--Alaska Native Claims Settlement Act: Aboriginal Claims--Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Generally

Subsec. 4(c) of ANCSA, 43 U.S.C. | 1603(c) (1982), bars the assertion of any claim based on prior Native use and occupancy of lands in Alaska. An assertion that a homesite location is invalid by reason of Native use and occupancy of the land requires a showing of use and occupancy at some time in the past, including the time the homesite was located, and thus is barred.

13. Alaska: Land Grants and Selections--Alaska: Possessory Rights

Although the occupancy provisions of the Alaska Organic Acts (Act of May 17, 1884, ch. 53, | 8, 23 Stat. 24, 26 and Act of June 6, 1900, ch. 786, | 27, 31 Stat. 330) protected Native and missionary station occupation of lands as of the dates of enactment, neither Act granted a right to obtain title or vested other property rights in the occupants.

14. Alaska: Possessory Rights

Cessation of use or occupancy for a period of time sufficient to remove any evidence of a present use, occupancy, or claim to the land terminates all possessory interests protected under the Alaska Organic Acts and restores the land to its original status as vacant and unappropriated land, regardless of subsequent allegations that the former occupants never intended to permanently abandon use and occupancy of the land. Unless evidence of continued use and occupancy can be shown,

prior use and occupancy does not serve as a bar to the initiation of rights in the lands by others.

15. Alaska: Possessory Rights--Notice: Generally--Settlements On Public Lands

The presence of deteriorated partial remains of a church and unattended graves are not by themselves sufficient evidence to establish use and occupancy which is notorious, exclusive, and continuous, and of such nature as to put others on notice that another continues to use and occupy the land.

APPEARANCES: Thomas E. Meacham, Esq., Anchorage, Alaska, for appellant; James R. Mothershead, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Land Management; Russell L. Winner, Esq., Anchorage, Alaska, for Cook Inlet Region, Inc.; James Vollintine, Esq., Anchorage, Alaska, for Nondalton Native Corp., Nondalton City Council, and Nondalton Village Council.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Vernard Jones has appealed a September 3, 1986, decision by Administrative Law Judge Michael L. Morehouse which held appellant's homesite claim (AA-85) invalid because the land is occupied and claimed by Natives of Alaska. The decision was rendered after an evidentiary hearing held in Iliamna, Alaska, on August 22, 1976. A previous decision on other issues relating to the homesite claim was issued by the Assistant Solicitor on June 30, 1969. Vernard E. Jones, 76 I.D. 133 (1969) (hereinafter Jones).

This case and appellant's homesite claim have a long history. The numerous and sometimes complex legal issues were argued in a series of

posthearing briefs filed by appellant, the Bureau of Land Management (BLM), and intervenor Cook Inlet Region, Inc. (CIRI). Additional issues were raised in joint briefs filed by intervenors, Nondalton Native Corporation, Nondalton City Council, and Nondalton Village Council (Nondalton).

The facts necessary to understand the controversy are not complex but concern sensitive matters, and at times the briefs have reflected the emotions of the parties. Since the hearing in 1976, the parties have amplified the record with additional factual evidence in support of their legal arguments. The facts and issues are best understood in the context
of the events leading to the present appeal.

I

On July 22, 1966, Vernard E. Jones filed a "Notice of Location of Settlement or Occupancy Claim" form with BLM's Anchorage District Office. The notice stated that on July 17, 1966, Jones had begun to settle or occupy a 5-acre parcel of land on the north shore of Lake Clark immediately to the east of the mouth of the Kijik River. The notice was filed pursuant to the Alaska Homesite Act, which provides:

> [A]ny citizen of the United States, after occupying land of the character described as a homestead or headquarters, in a habitable house, not less than five months each year for three years, may purchase such tract, not exceeding five acres, in a reasonable compact form, without any showing as to his employment or business, upon payment of $2.50 per acre, under rules and regulations to be prescribed by the Secretary of the Interior * * *.

Act of May 26, 1934, ch. 357, 48 Stat. 809-10, repealed by Federal Land Policy Management Act of 1976, P.L. 94-579, | 703(a), 90 Stat. 2743, 2789-90.

BLM sent Jones a form acknowledgement dated September 20, 1966, and assigned serial number AA-85 to the claim. One paragraph of the form stated: "Our records show that the lands are subject to settlement or occupancy. Your notice of location is therefore recognized as of the date filed." Shortly thereafter, Joseph McGill and Grant H. Pearson, members of the Alaska State Legislature, sent a letter concerning Jones' homesite to the Director of the Division of Lands, State of Alaska, stating, in part:

> The location where his homestead is staked in [sic] on the old Russian Church that was built in 1896. The old Indian graveyard is located near this church and is also on the area staked.
>
> It is very important that these Historical remains be protected and we highly recommend that this homestead be disallowed.

Jones, supra at 134; Exh. 42 at 45.

The letter was referred to BLM, and by notice dated February 6, 1968, BLM vacated its acknowledgement of Jones' homesite and declared his location notice unacceptable. BLM's notice stated that a protest against settlement of the land had been filed and a field investigation had found the homesite to be "within the old Kijik Native Village which contains the ruins of an old Russian Orthodox church, archaeological deposits, and between two and three hundred Native graves." BLM concluded that under the Antiquities Act of 1906 (ch. 3060, 34 Stat. 225, codified at 16 U.S.C. || 431-433 (1982)),

"the antiquities located on the old Kijik Native Village at Lake Clark are the property of the United States" and could "only be removed or disposed of" in accordance with Departmental regulations promulgated under the Act. In addition, BLM noted that Public Land Order No. (PLO) 2171 (25 FR 7533 (Aug. 10, 1960)) had withdrawn and reserved "public lands customarily used by Indians, Eskimos, and Aleuts as burial grounds for their dead."

Jones appealed BLM's decision to BLM's Office of Appeals and Hearings. 1/ By decision dated March 13, 1968, the Office of Appeals and Hearings found BLM's determination that "the homesites are incompatible

with the 1906 law is correct." 2/ Jones then appealed to the Assistant Solicitor-Public Lands. By decision dated June 30, 1969, Ernest F. Hom, Assistant Solicitor, Land Appeals, issued the Jones decision addressing four matters relevant to the present appeal.

First, the decision noted that the parties "appear to have viewed appellant's notice of location as the equivalent of an application for land" which BLM could reject upon determining that the land "should not be disposed of in the manner contemplated in the filing of the notice." Jones, supra at 136. The opinion pointed out that, in Alaska, a notice of location is not an application, and a determination of suitability is not a prerequisite to settlement.

1/ At the time BLM maintained an Office of Appeals and Hearings. The Office of Hearings and Appeals, and its component, the Interior Board of Land Appeals, were created in 1970 by order of the Secretary of the Interior. See 35 FR 10012 (June 18, 1970), 35 FR 12081 (July 28, 1970).
2/ Jones was joined in the appeal by Hollis E. Justis who had filed a homesite selection next to Jones'. See Hollis E. Justis, 21 IBLA 63 (1975). A description of the Justis appeal is found in Jones, supra.

> If land is vacant and unappropriated, that is, if no prior rights have been established and if the land has not been withdrawn or otherwise closed to operation of the public land laws, any person who is qualified to enter under those laws may, without seeking or obtaining permission from the land office, occupy or settle on a tract of land and, through compliance with one of the applicable laws, establish in himself rights in the land which will ultimately entitle him to receive patent to the land. * * *
>
> * * * The filing of a notice of location, however, does not establish any rights in land, the establishment of such rights being entirely dependent upon the acts performed in occupying, possessing and improving land and their relationship to the requirements of the law under which the settler seeks to obtain title. [Citations omitted.]

Id. at 136-37. The Assistant Solicitor concluded that acceptance of appellant's notice of location "did not preclude a later determination that the land which appellant claimed was not open to entry and that no rights were established by his settlement on the land." Id. at 137.

The Jones decision next addressed "the premises for the Bureau's determination that the land was closed to settlement." Id. BLM's reliance on PLO 2171 was rejected because "[t]he record clearly indicates that no plat of survey has been filed which delineates any native cemetery on the land in question." Id. at 138. By its terms, the PLO was effective immediately for Native cemeteries which had been surveyed and for others "upon the filing * * * of an accepted plat of survey designating an area as a cemetery, and the notation thereon of the character of such cemetery as a Native cemetery." 25 FR 7533 (Aug. 10, 1960).

The decision then addressed the Antiquities Act. It noted that section 2 (16 U.S.C. | 431 (1982)) "speaks of a reservation of lands but it

provides for accomplishing this by a Presidential proclamation designating the reserved land as a national monument." Jones, supra at 139. Addressing the other sections of the Act (16 U.S.C. || 432-433 (1982)), the Assistant Solicitor found that "nothing in the express language of those sections has anything to do with the reservation of lands." Id. Consequently, it was determined that: "As the record does not show that the land in question has been withdrawn as an historic site or that it was withdrawn for any other purpose at the time of appellant's settlement, we cannot conclude that it was proper to refuse to accept appellant's notice of location." Id. at 140.

The Jones decision noted one additional matter which may have anticipated the current proceedings: "Inasmuch as the land embraced in appellant's homesite claim apparently was included in the site of Kijik Village, it may be that there are vested rights in the former villagers or their descendants which would preclude the obtaining of any rights through settlement on the land in 1966." Id. The opinion also noted that, with a limited exception, all public lands in Alaska had been withdrawn from all appropriation pending action by Congress to resolve the rights of Native Aleuts, Eskimos, and Indians. PLO 4582, 34 FR 1025 (Jan. 23, 1969). Pointing out that the withdrawal did not preclude recognizing Jones' homesite claim, the decision stated:

> [S]hould it be determined that appellant's settlement was preceded by the establishment of rights in others, appellant's homesite location would necessarily have to be declared null and void. If, on the other hand, the land is found to have been vacant, unappropriated and unreserved on July 17, 1966, appellant is entitled to credit for his acts of occupancy and use after that date.

Jones, supra at 140. The Jones decision reversed BLM and the case was remanded "for action consistent with this decision." Id.

The Jones decision was issued June 30, 1969. On July 17, 1969, Jones filed a request for reinstatement of his homesite selection. On October 31, 1969, he filed an application to purchase the land. There is no indication that BLM acted on his homesite application until February 3, 1976, when it filed a complaint initiating the contest proceeding which is the subject of this appeal.

The contest complaint listed three charges 3/ based on the Homesite Act and 43 CFR 2563.2-1(e)(4), which requires a homesite applicant to show:

> That no portion of the tract applied for is occupied or reserved for any purpose by the United States, or occupied or claimed by any native of Alaska, or occupied as a townsite, or missionary station, or reserved from sale, and that the tract does not include improvements made by or in the possession of any other person, association, or corporation.

3/ The charges were:

"(a) Section 10 of the act of May 14, 1898 (30 Stat. 413) and the act of March 3, 1927 (44 Stat. 1364), as amended to date, (43 U.S.C. section 687(a)), and the regulations promulgated by the Secretary of the Interior, specifically 43 CFR 2563.2-1(e)(4), requires that no portion of the land claimed may be occupied or reserved for any purpose by the United States or occupied or claimed by Natives of Alaska. Contestee has attempted to claim land claimed by Natives as burial grounds.

"(b) Section 10 of the act of May 14, 1898, as amended, supra., and the regulations promulgated by the Secretary of the Interior, specifically 43 CFR 2563.2-1(e)(4), requires that the land must be unoccupied, unimproved, and unappropriated by any person claiming the same other than the applicant. Contestee has attempted to appropriate lands which are not unimproved and unappropriated by any other person.

"(c) Section 10 of the act of May 14, 1898, as amended, supra., and the regulations promulgated by the Secretary of the Interior, specifically 43 CFR 2563.2-1(e)(4), requires that no portion of the land claimed may be occupied or reserved for a missionary station. The St. Nicholas Russian Orthodox Church of Nondalton claims the church building and the burial grounds on the claim."

Neither the charges nor the case presented at the hearing were directed toward establishing that Alaska Natives or other persons were living on the land when Jones filed his notice. Rather, the evidence presented at the hearing and documents subsequently admitted into the record pertain to the nature and extent of the previously existing Kijik village, the remains of the Russian Orthodox Church and associated burial area, and the alleged continuity of Native claims to the land based upon these facts. The contest hearing was held before Administrative Law Judge Dean F. Ratzman on August 22, 1976. Completion of posthearing briefing was delayed by a number of extensions granted to facilitate negotiations among the parties.

Following passage of the Alaska Native Claims Settlement Act of 1971 (ANCSA), P.L. 92-203, 85 Stat. 688, codified at 43 U.S.C. || 1603-1627 (1982), as amended, CIRI filed a selection application pursuant to section 14(h)(1), 43 U.S.C. | 1613(h)(1) (1982). The lands described in the application included Jones' homesite. By decision dated October 22, 1981, BLM held that the land described in Jones' homesite application was not available for selection. By order dated December 28, 1981, the contest proceedings were suspended pending CIRI's appeal of BLM's October 22, 1981, decision to this Board. On appeal BLM conceded error and the Board set aside the BLM decision. Cook Inlet Region, Inc., 77 IBLA 383, 384 n.1, 90 I.D. 543, 544 n.1 (1983).

Following issuance of the Cook Inlet decision, briefing resumed and, after further extensions and submittal of additional documents, the record was closed by order dated February 25, 1985. In the interim between the

hearing and the completion of the record, Judge Ratzman retired and the case was assigned to Administrative Law Judge Morehouse. After reviewing the record, in a decision dated September 3, 1986, Judge Morehouse made findings of fact and concluded:

> [A]t the time Jones filed his notice of location in 1966, at the time he filed his application to purchase the land in 1969, and at the time of the hearing in 1976, the land covered by Jones' homesite claim was occupied and claimed by Natives of Alaska and the tract contained improvements made by and in the possession of others; that Jones was, or should have been, fully aware of the claims and interests of the Nondalton natives; and that by reason of the regulations * * * the land was not available for entry as a homesite claim.

(Decision at 5). On October 18, 1986, Jones filed a notice of appeal. The parties then filed a series of briefs addressing legal issues pertaining to a number of Federal statutes enacted between 1884 and 1971.

Unlike the issues of law, the facts concerning the occupation of Kijik village are not in dispute. The record includes anthropological and archeological studies which also review historical records pertaining to the area. Lynch, Qizhjeh (U. of Alaska, paper No. 32, 1982); 4/ Vanstone & Townsend, Kijik: An Historic Tanaina Indian Settlement (Fieldiana: Anthropology, vol. 59, 1970). These sources provide the following information.

Tanaina Indians migrated to the Cook Inlet area prior to European exploration and some may have moved inland to the Lake Clark area late in

4/ The copy of the study in the record is missing pages iv, viii, and 33.

the 18th century to avoid Russian harassment (Qizhjeh at 6-7; Kijik at 21-22). At least two sites were occupied prior to the establishment of Kijik village near the shore of Lake Clark sometime before 1840, although some sites may have been occupied simultaneously (see Qizhjeh at 9, 12-16). The Kijik villagers lived in small houses built of hewn log walls with base logs laid a foot or so into the ground (see Kijik at 29-45). Population figures for the village are inconsistent but suggest that people may have been moving away during the late 1800's. 5/

Around the turn of the century a number of maladies struck the village, and by 1909 the village was abandoned (although at least one person may have remained in the area) (Qizhjeh at 10, 76; Kijik at 23, 25; see also Tr. 120-21). The survivors moved approximately 35 miles to the old village of Nondalton on Sixmile Lake, and moved again in 1940 to the present town of Nondalton (Qizhjeh at 10). Most or all of the houses at Kijik were dismantled and moved by the former villagers (Kijik at 23). 6/

5/ See Qizhjeh at 9-10; Kijik at 22-23. The census reports for 1880 and 1890 list villages which may be Kijik. If so, the population was reported as 91 in 1880 and 42 in 1890. Other reports place the population at 106 in 1898 and 22 in 1902.

6/ Kijik at page 23 reports that two houses were left standing. If so, they no longer exist. See also Exh. 40 at 18. Additional details of the moving of the houses were provided at the hearing by Nicholia Kolyaha who was born in Kijik in 1892 (Tr. 61). He also testified that during the winter a priest had come and the church was dismantled and moved to Old Nondalton (Tr. 68-70). Because some walls of the church still exist, his testimony may describe the removal of the vestibule, which was constructed with milled wood (very valuable at the time), and the church roof, which may have been copper. See Qizhjeh at 63, but see Tr. 82-83. If so, a tree may have been planted at the site of the altar. See id. at 24; Olekasa Deposition at 16-17; Tr. 71, 73-74, 275.

Although no structures remain standing at the village site, to the south is the three-part, bay-window shaped wall of the altar end of a Russian Orthodox Church and the partial remains of the side walls (see Qizhjeh at 60-65; Kijik at 45-49). The date of church construction is not known, but 1877, 1881, and 1884 have been suggested (Qizhjeh at 60, Kijik at 21). Associated with the church is a cemetery area of scattered graves which extends a considerable distance east and southeast of the church along a ridge to a point on the shore of Lake Clark (see Qizhjeh 14, 18; Kijik at 48). Although at least some graves were originally marked with Russian Orthodox crosses, the gravesites were not maintained and the precise number of graves is not known. 7/ Within the cemetery area there are also several house sites and a number of cache pits (Qizhjeh at 18, 26, 34, 65).

Although in issue at the hearing, there no longer appears to be any question that the remains of the church are within appellant's homesite (see Statement of Reasons at 3; Reply Brief at 4, 8-9). There is no evidence as to the total number of graves within the homesite, but, based on the location of the remains of the church and other evidence presented at the hearing, there is no question that some lie within the homesite (see Tr. 177, 197, 207, 230-32, 253).

The ultimate issue before us concerns conflicting claims of rights to the 5-acres within appellant's homesite. The factual issues concern the

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7/ Qizhjeh at pages 63-64 cites no source for the statement that more than 100 crosses were standing in the 1930's. The number may originate with Tr. 96-97. But cf. Tr. 146-47, 150. Kijik at page 48 reports finding nine crosses during excavations of the village site in 1966. See also Exh. 40 at 41-43.

acts of use and occupancy on which the claims are based. Prior to considering Judge Morehouse's findings on these matters, we must address the legal arguments which would obviate our review of the factual issues.

II

We begin with the issues raised by Nondalton. If Nondalton is correct, the outcome of the contest is irrelevant, and there is no reason to review the proceedings.

Nondalton first argues that we should reconsider and overrule the ruling regarding the Antiquities Act made in the Jones decision (Nondalton Brief on Appeal at 8). Nondalton notes that the Board's authority to do so was recognized in Ideal Basic Industries v. Morton, 542 F.2d 1364, 1367-68 (9th Cir. 1976):

> Recognition of the IBLA's power to reconsider under the circumstances of this case is consistent with the fact that it has long been recognized that the Secretary of [the] Interior has broad plenary powers over the disposition of public lands. He has a continuing jurisdiction with respect to these lands until a patent issues, and he is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors in interest. So long as the legal title remains in the Government, the Secretary has the power and duty upon proper notice and hearing to determine whether the claim is valid. [Citations omitted.]

Appellant responds by arguing that the Jones decision was issued under delegated Secretarial authority and cannot be overturned because it

reversed a decision made by the predecessor to this Board (Reply Brief at 13-14).

[1] The Board of Land Appeals is a part of the Office of Hearings and Appeals, a component of the Office of the Secretary of the Interior, and is authorized "for the purpose of hearing, considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary." 43 CFR 4.1. When considering appeals, the Board exercises the authority previously delegated to the Office of the Solicitor. 35 FR 12081 (July 28, 1970).

Under the principle of stare decisis, rules of law established by prior Departmental decisions are binding precedent. However, such decisions, including Secretarial decisions, may be overruled when found to be erroneous. See United States v. Union Carbide Corp., 31 IBLA 72, 84 I.D. 309 (1977); United States v. Winegar, 16 IBLA 112, 166-80, 81 I.D. 370, 392-98 (1974). 8/ Under the principle of administrative finality--the administrative counterpart of res judicata--an agency decision may not be reconsidered after a party has been given an opportunity for Departmental review and did not seek review, or appealed and the decision was affirmed. See, e.g., Turner Brothers, Inc. v. OSMRE, 102 IBLA 111, 121 (1988). However, as

8/ Winegar overruled Freeman v. Summers (On Rehearing), 52 L.D. 201 (1927). The result was reversed by the U.S. District Court for the District of Colorado based on its finding of congressional ratification of the rule of discovery set forth in Freeman. Shell Oil Co. v. Kleppe, 426 F. Supp. 894, 899-902, 908 (D. Colo. 1977), aff'd, Shell Oil Co. v. Andrus, 591 F.2d 597 (10th Cir. 1979), aff'd, 446 U.S. 657 (1980).

recognized in Ideal Basic Industries, as a matter of administrative authority, so long as title to the affected land remains in the Department, the Secretary, or those exercising his delegated authority, may correct or reverse an erroneous decision. 9/

Having authority to reconsider the Jones decision, we find no need to do so. Nondalton's Antiquities Act arguments are without merit.

[2] With respect to section 2 of the Act (16 U.S.C. | 431 (1982)), Nondalton argues that the Department erred in Jones when finding the land not to have been withdrawn, because, according to Nondalton, the Act grants the Secretary broad authority and, by virtue of the Department's trust responsibilities, lands containing Indian ruins must be regarded as reserved (Nondalton Posthearing Brief at 10-11, Brief on Appeal at 10). This argument has no statutory foundation. Nothing in the Antiquities Act suggests that it is self-executing or operates other than by a formal determination affecting a specific parcel of land. Section 2 of the Act does not directly grant Secretarial authority to withdraw land. Instead it authorizes the President of the United States "to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest * * * to be national monuments, and may reserve as a part thereof parcels of land * * *." 16 U.S.C. | 431 (1982).

9/ See also Gabbs Exploration Co. v. Udall, 315 F.2d 37, 40 (D.C. Cir.) cert. denied, 375 U.S. 822 (1963); cf. Northwest Alaskan Pipeline Co., 99 IBLA 201, 206-07 (1987); A. W. Schunk, 16 IBLA 191, 197 (1974) (A.J. Stuebing concurring and dissenting in part); Harkrader v. Goldstein, 31 L.D. 87, 91 (1901). Within its procedural rules the Board provides a limited exception, when allowing petitions for reconsideration to be filed within 60 days of the date a decision is issued; otherwise its decision is final for the Department. 43 CFR 4.403.

We know of no instance in which section 2 has been applied to reserve land without a proclamation. The Antiquities Act was passed in 1906. If it had reserved land by virtue of the presence of Indian ruins or artifacts, every pending or subsequent public land entry would have been placed in jeopardy by the discovery of a qualifying object. We know of no prior decision which has even considered the question. Cf. United States v. Gunn, 7 IBLA 237, 79 I.D. 588 (1972); Grand Canyon Scenic Railway Co., 36 L.D. 394 (1908). To the contrary, the Act itself contains ample evidence that Congress anticipated that significant objects would be found on public lands to which private parties had acquired rights. In section 2 Congress also provided:

> When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract * * * may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.

16 U.S.C. | 431 (1982). By providing for relinquishment, Congress recognized the validity of rights to lands containing qualifying objects.

Nondalton also argues that Archaeological Ruins, 52 L.D. 269 (1928), cited and relied upon in Jones, can be distinguished (Nondalton Brief on Appeal at 9-10). Nondalton, however, does not point to any error in the discussion of the Antiquities Act presented in Archaeological Ruins. Although Archaeological Ruins clearly addressed a different question than did Jones, the difference does not render the earlier decision irrelevant. Jones did not simply apply the conclusion of Archaeological Ruins, but

examined its reasoning regarding the question whether the Antiquities Act made an implied reservation of lands containing historic ruins or objects of antiquity. Jones, supra at 139. It found that implicit in the answer given to one question addressed in Archaeological Ruins "was the conclusion that land subject to the act is not thereby withdrawn or reserved from future entry under the homestead law." Id. Based on this, and other matters, Jones concluded that "the Antiquities Act itself has no segregative effect." Id. at 140. Both decisions rejected the position now advanced by Nondalton that lands containing Indian ruins are reserved by the Antiquities Act. Nondalton has not shown that either was in error. 10/

Finally, Nondalton argues that by making a homesite application Jones violated section 1 of the Antiquities Act, which provides a fine and imprisonment for "[a]ny person who shall appropriate, excavate, injure,

or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government" without having received prior permission from the department having jurisdiction over the lands. 16 U.S.C. | 433 (1982). Nondalton views appellant's homesite as an illegal attempt to "appropriate" the remains at the Kijik site, and thus maintains that the homesite is invalid (Nondalton Brief on Appeal at 9).

10/ One conclusion reached in Archaeological Ruins was that objects within the purview of the Antiquities Act "belong to the United States--the owner of the fee--at least until the entryman has earned the equitable title to the land, and are subject to the right of the Government to issue permits
or licenses for the examination, excavation, and recovery thereof * * *." Archaeological Ruins, supra at 271. However, "an entryman of public lands embracing ruins and archaeological sites, upon showing compliance with statutory conditions, is entitled to an unrestricted patent." Id. at 272.

[3] Nondalton views the homesite as an "appropriation" under the Antiquities Act but offers no basis for this conclusion. Nondalton's reading of the statute shares the defects found in its position regarding section 2. Within the context of public land laws, an individual who claims a tract of land in compliance with such a statute is sometimes said to have "appropriated" the land. However, there is no legal history indicating that the verb "appropriate" carries this meaning in the Antiquities Act. As with section 2, every person acting pursuant to public land laws would have been in jeopardy of the cancellation of his claim and prosecution in the courts upon the discovery of artifacts. As a matter of statutory interpretation, it would be incongruous to conclude that Congress recognized private parties might acquire rights to public lands containing antiquities, provided a mechanism for the relinquishment of such rights, and at the same time subjected the party to prosecution for having selected the land. More sensibly, Congress intended "appropriate" in section 1 to prohibit the removal of objects from Federal lands and understood the statute to operate within the context of the criminal laws.

[4] Nondalton also argues that transfer of title to appellant's homesite is precluded by the National Historic Preservation Act of 1966 (NHPA), P.L. 89-665, 80 Stat. 915, 16 U.S.C. || 470-470w-6, as amended, (see Nondalton Brief on Appeal at 13). Nondalton raises a valid point as to the NHPA, but its conclusion that the NHPA bars approval of appellant's application for patent does not follow. Appellant's homesite is within the Kijik Historic District, which is on the National Register of Historic Places.

45 FR 17446, 17447 (Mar. 18, 1980). As a result, the NHPA must be considered by BLM when reviewing appellant's homesite application. See 16 U.S.C. | 470f (1982); 36 CFR Part 800; State of Alaska, 85 IBLA 196, 204-05 (1985). In the present posture of this case, however, it would be premature to specify the review BLM must undertake. For the purposes of this appeal it is sufficient to note that "the NHPA is essentially a procedural, action-forcing statute designed to ensure that cultural resources are identified and considered in the decision-making process. It does not provide for a veto or absolute bar to federal undertakings which may adversely affect such resources." Solicitor's Opinion, 87 I.D. 27, 29 (1979). The fact that NHPA procedures must be undertaken when reviewing appellant's homesite application neither invalidates the homesite location nor necessitates rejection of the application for patent.

III

We turn next to appellant's argument that, regardless of the findings now under appeal, he is entitled to receive a patent under the Confirmation Act, 43 U.S.C. | 1165 (1982). The Confirmation Act was enacted as part of the General Revision Act of 1891. Act of Mar. 3, 1891, ch. 561, 26 Stat. 1095. As originally enacted, the pertinent portion stated:

> Provided, That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land,
> or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

Id. at 1099. As a result of changes in administrative organization, the reference to a "receiver's receipt" was changed to "receipt of such officer as the Secretary of the Interior may designate." 43 U.S.C. | 1165 (1982).

Appellant first alleged entitlement to patent under the Confirmation Act in his 1984 posthearing brief. In the period between the hearing and his brief, the U.S. Court of Appeals for the Ninth Circuit

characterized

the Alaska Homesite Act as a "homestead law" under the Confirmation Act

and found the contest before the court to be barred by the latter statute. Grewell v. Watt, 664 F.2d 1380, 1384 (9th Cir. 1982). Appellant argues that, having been initiated more than 2 years after he filed his application for patent, the BLM contest was too late and he is entitled to a patent as a matter of law (Contestee's Posthearing Brief at 7-8).

Jones' opponents raise four arguments against his contention:

(1) the statute does not preclude the United States from exercising its trust responsibility to protect the possessory rights of Natives (BLM

Answer at 14-17; CIRI Response on Appeal at 13); (2) the statute does not bar a Government contest based on prior third-party rights (CIRI Posthear-

ing Brief at 32-34; CIRI Response on Appeal at 13); (3) even if the statute applies, the 2-year period did not run because a protest was pending (CIRI Posthearing Brief at 30-32; BLM Posthearing Reply Brief at 2-3; CIRI Posthearing Reply Brief at 27-34; BLM Answer at 17-19; CIRI Reply Brief at 10-12); and (4) even if the statute applies, Jones does not qualify because he has never paid the purchase price and received a receipt (BLM Posthearing Reply Brief at 3-6; BLM Reply Brief at 8-14; CIRI Reply Brief at 7-10). The

first two counter-arguments raise an issue whether the Confirmation Act may apply, and the second two whether it does apply.

The opponents' first two arguments assert that there are circumstances in which "the two year period of limitation in the Confirmation Act" does not apply (BLM Answer at 15; see CIRI Posthearing Reply Brief at 32). Characterizing the Confirmation Act as a statute of limitations misconstrues its nature and effect. The court in Grewell v. Watt, supra at 1382 n.1, rejected this characterization of the Act, noting that "it is not a statute of repose, protecting against dilatory action," but rather "permits an entryman to ground affirmative rights on its language." Similarly, in Payne v. Newton, 255 U.S. 438, 444 (1921), the Supreme Court stated that "the evident purpose of Congress" was

> to require that the right to a patent which for two years has been evidenced by a receiver's receipt, and at the end of that period stands unchallenged, shall be recognized and given effect by the issue of the patent without further waiting or delay,--and thus to transfer from the land officers to the regular judicial tribunals the authority to deal with any subsequent controversy over the validity of the entry, as would be the case if the patent were issued in the absence of the statute. [Emphasis supplied.]

See also Stockley v. United States, 260 U.S. 532, 540-44 (1923); Lane v. Hoglund, 244 U.S. 174 (1917).

[5] The statute grants a right to a patent 2 years after issuance of a "receipt upon the final entry" when there is "no pending contest or protest." No contest may be initiated because the entry has matured into a right and the facts on which the entry was based may no longer be questioned. Nothing in the wording of the Act provides for an exception to its

application, and the language used by the courts precludes recognizing one. When Congress creates a right, neither the Department nor this Board has the power to remove it by creating an exception. Cf. Schade v. Andrus, 638 F.2d 122, 124 (9th Cir. 1981).

[6] The argument that the Confirmation Act does not bar a Government contest to protect Native possessory rights is also based on an analogy between the Confirmation Act and 43 U.S.C. | 1166 (1982) which provides: "Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents" (BLM Answer on Appeal at 15-17). The Supreme Court has held that the latter statute does not preclude suits by third parties and, consequently, is "without application to suits by the United States to annul patents * * * because issued in alleged violation of rights of its Indian wards and of

its obligations to them." United States v. Minnesota, 270 U.S. 181, 196 (1926); see Cramer v. United States, 261 U.S. 219, 233-34 (1923). Because the Confirmation Act is not a statute of limitations, the analogy fails and the cited cases cannot be applied.

The Board is keenly aware of the importance of the Department's obligation to protect Native rights. However, this duty does not extend to actions which would repudiate rights Congress has granted by statute or negate the duties the Department owes to other citizens. See Milton R. Pagano, 41 IBLA 214, 218 (1979); Lane v. Hoglund, supra at 181. Nor does our rejection of this argument render the Department unable to pursue its obligations to Native Americans. An entryman's right to receive a patent

under the Confirmation Act does not preclude a subsequent judicial chal- lenge of its validity. As quoted above from Payne v. Newton, supra, the Confirmation Act transfers authority over controversies concerning the validity of an entry to the courts after the 2-year period has passed, giving an entryman the protection of a judicial forum. The Supreme Court's decisions regarding 43 U.S.C. | 1166 (1982) expand the time within which the Department may bring such a suit to protect Native rights. However, this does not prevent the Confirmation Act from applying.

CIRI argues that the Confirmation Act does not bar BLM's initiation of a contest to protect third-party rights, based on Henry King Middleton, Jr., 73 I.D. 25 (1966) (CIRI Posthearing Brief at 32-34). However, the Middleton opinion does not support this conclusion.

In Middleton, the appellant's homestead entry had been canceled for failure to comply with the cultivation requirements of the homestead law. On appeal to the Secretary, the appellant claimed entitlement to a patent under the Confirmation Act, raising a question whether the Act was in conflict with the homestead laws and thus inapplicable in Alaska. Id. at 27. 11/ A possible conflict was posed because the patenting procedure followed in Alaska allowed payment of the purchase price and issuance of a receipt prior to publication of notice of the patent application, rather than after publication. Id. at 28-29.

11/ The Act of May 14, 1898, ch. 299, | 1, 30 Stat. 409, as amended by the Act of Mar. 3, 1903, ch. 1002, 32 Stat. 1028, extended to Alaska the provisions of the homestead laws "not in conflict with this Act."

The Middleton opinion first considered whether the Alaska procedure would cause the Confirmation Act's 2-year period to commence with the publication of notice, rather than with issuance of a receipt. This possibility was rejected because in Stockley v. United States, the Supreme Court rejected the argument that the period, which by statute commenced with the issuance of the "receiver's receipt upon the final entry," could be varied to take into account changes in the Department's administrative procedures. Id. at 29-30.

The Middleton opinion next considered whether a 2-year period, commencing with issuance of a receipt and leading to "a present right to receive a patent," was in conflict with 43 U.S.C | 270-4 (1982) 12/ which "precludes the issuance of a patent until after publication of notice and expiration of the period for a third party to institute adverse proceedings in court." Id. at 30. The Department found no conflict because, even though the requirement to publish notice and allow third parties to raise adverse claims "might require more than two years after the filing of final proof to determine the rightful patentee," this procedure "need not affect the determination of the entryman's compliance or the rights and obligations existing between the United States and the entryman." Id. at 31. Thus,

the Department concluded that the statutes were not in conflict, because

the Government need not delay action on an applicant's final proof pending publication of notice. Id. at 32.

Consequently, the Confirmation Act was

12/ The statute was enacted as part of section 10 of the Act of May 14, 1898, ch. 299, 30 Stat. 409, 413-14, repealed by Federal Land Policy and Management Act of 1976, P.L. 94-579, | 703(a), 90 Stat. 2743, 2789-90.

held to apply in Alaska, and the Government is required to take action on Alaskan applications within 2 years. If it does not, "the Department is without authority to challenge it thereafter." Id. at 33.

The Middleton opinion went on to note that:

> A modification in the procedure followed in other States would be required, however, where, as here, more than 2 years elapsed after the issuance of the final receipt without the initiation of a contest or protest and where publication was not made. In this situation notice of the filing of final proof must still be published, and third parties claiming rights adverse to those of the entryman must be given an opportunity to assert their claims.

Id. at 32. CIRI quotes this portion of the Middleton decision and concludes that the Confirmation Act does not bar a Government contest "so long as the government contest raised issues of prior third-party rights to the subject land" (CIRI Posthearing Brief at 34). The conclusion does not follow from the decision. The reference is to the procedure followed in "other States," and the "modification" is that a patent will not issue at the end of the 2-year period when notice has not been published and third parties have not been given an opportunity to assert their rights. The statement does not pertain to Government contests. Under the statute, third-party adverse claims are prosecuted in the courts. 43 U.S.C. | 270-4 (1982). Nothing in Middleton suggests that such claims may be pursued within the Department by either the Department or a private party. To the contrary:

> If no action is taken within that period to challenge the sufficiency of an entryman's proof, the Department is without authority to challenge it thereafter. 2/

2/ The statute similarly cuts off any private contest or protest in which the entryman's performance is challenged, for, when the Department can no longer challenge the entryman's compliance with the law it is also precluded from entertaining a similar contest or protest brought by a private individual. See John N. Dickerson, 35 L.D. 67 (1906); Milroy v. Jones, 36 L.D. 438 (1908).

Id. at 32-33. Any other conclusion would negate a right granted by Congress. Thus, Middleton does not preclude application of the Confirma-tion Act to the present case to bar a contest based on the rights of third parties.

Having determined that the Confirmation Act may apply in the present case, we turn to the question whether it does. Jones' opponents argue that the statute does not apply because a protest was pending and appellant has not received a receipt. Both matters are controlled by well-settled law.

In Lane v. Hoglund, supra at 178, the Supreme Court commented upon the use of "pending contest or protest" in the Confirmation Act:

> As applied to public land affairs the term "contest" has been long employed to designate a proceeding by an adverse or intending claimant conducted in his own interest against the entry of another, and the term "protest" has been commonly used to designate any complaint or objection, whether by a public agent or a private citizen, which is intended to be and is made the basis of some action or proceeding in the public right against an existing entry.

The Court's description was based partially on the original Departmental instructions issued under authority of the Act. See Instructions, 12 L.D.

450, 453 (1891); Instructions, 13 L.D. 1, 3 (1891). It remains accurate under the current regulations, except that the term "contest" is now also used to designate a formal hearing initiated by the Government for the purpose of invalidating an entry. See 43 CFR 4.450-1, 4.450-2, 4.45l. In Jacob A. Harris, 42 L.D. 611, 614 (1913), it was said that, to preclude application of the Confirmation Act, a contest or protest

> must be a proceeding sufficient, in itself, to place the entryman on his defense or to require of him a showing of material fact, when served with notice thereof; and, in conformity with the well established practice of the Department, such a proceeding will be considered as pending from the moment at which the affidavit is filed, in the case of a private contest or protest, or upon which the Commissioner of the General Land Office, on behalf of the Government, requires something to be done by the entryman or directs a hearing upon a specific charge.

Jones' opponents point to two documents as constituting protests--the 1966 McGill-Pearson letter which led to the decision in Jones, and a field report dated June 12, 1967 (CIRI Posthearing Brief at 30). 13/ There is no need to consider whether the McGill-Pearson letter was a protest. In Jones, supra at 134, the Assistant Solicitor stated that the letter was "treated as a protest" by BLM. This comment was based on BLM's characterization of the letter in its notice vacating acknowledgement of appellant's notice of location. The question on appeal is whether Jones resolved the protest, or in some sense the protest continued after remand, precluding application of the Confirmation Act (See Contestee's Posthearing Reply Brief at 3; BLM Answer at 18).

13/ The opponents also point to several other letters as constituting protests. None is dated within 2 years of Oct. 31, 1969, the date of appellant's patent application.

[7] The argument that the letter continued as a protest overlooks the context in which it was sent. At that time the only document Jones had filed with BLM was his notice of location. Presumably the objectionable "action proposed to be taken" was BLM's acceptance of Jones' notice of location. See 43 CFR 4.450-2. Upon investigation, BLM vacated its acknowledgment of the notice, thus requiring Jones to take action to defend his homesite. Until the decision vacating acknowledgement of his notice was reversed, Jones could not make an application to purchase the land.

In 1969 Jones filed a formal request for reinstatement of his notice of location. He then filed an application to purchase. When Jones filed his application to purchase, a protest could have been lodged objecting to the possible approval of the application. However, the letter filed in 1966 could not constitute a protest of pending approval of an application which had not been filed and was not filed until 3 years later. Until the patent application was filed, there could not be a final entry triggering the Confirmation Act. Correspondingly, the letter could not be a "protest against the validity of such entry" precluding the Act's application. See 43 U.S.C. | 1165 (1982).

The argument that the letter continued as a protest is also based on an assertion that the letter raised issues not addressed in Jones. In support of this contention, the parties point to the facts stated in the letter and its request that BLM "do all you can to protect this site" (BLM Answer at 18). The comment in Jones regarding possible Native rights and the remand to BLM are construed as having been directed to the additional issues raised by the letter.

The protest letter referred to the "old Russian Church" and "old Indian graveyard" and their historic importance as the relevant concerns on which BLM should act. Although these were not allegations of "issuable facts which, if true, would defeat the entry and warrant its cancellation" (Gildner v. Hall, 227 F. 704, 705 (D. Or. 1915)), 14/ the letter clearly raised a proper concern, the authors intended BLM to take action, and, upon investigation, BLM did. BLM's decision rejecting the notice of location responded to the concerns stated in the letter and placed Jones "on his defense" by giving the facts legal grounds. See Jacob A. Harris, supra. When the issue reached the Secretary, the Department held that, because the land had not been withdrawn, BLM acted improperly when rejecting Jones' notice of location. Jones, supra at 140. That decision settled the legal claims made in BLM's notice of rejection.

Having resolved the issues, the Jones decision noted that there may be "vested rights in the former villagers or their descendants," that the issue of Native rights was unresolved, and that if it is determined that others had prior rights, "appellant's homesite location would necessarily have to be declared null and void." Id. at 140. These statements do not suggest that it was thought that any issue raised by the protest letter or BLM's notice of rejection remained to be acted upon. Rather, they refer to the

14/ This wording must be interpreted in the context of the homestead laws. In such cases "issuable facts" are allegations that the applicant has not completed the required acts. If true, such facts are sufficient to cancel the entry. In contrast, the facts stated in the letter concern the availability of the land for entry and settlement. If true, they would alert
BLM to the possibility that the land might be held by another, but would not necessarily "defeat the entry and warrant its cancellation." Rather, this result would follow only if others had acquired rights to the land making it unavailable for location as a homesite.

opinion's prior discussion of procedures for selecting lands in Alaska. The issues reviewed by the Assistant Solicitor were whether the land was "withdrawn or otherwise closed to operation of the public land laws," and not whether the "land is vacant and unappropriated" because "no prior rights have been established." Id. at 136. The opinion acknowledged that the issue of Alaskan Native rights was under congressional scrutiny and that, because of the procedures in Alaska for selecting a homesite, the question of prior rights remained open. However, these questions cannot be attributed to anything stated in the McGill-Pearson letter. If any issue raised by the protest had remained, the case would have been remanded with instructions to BLM to investigate and, if appropriate, conduct a hearing. It would have then been incumbent on BLM to again take action. Instead, the decision rejected Jones' request for a hearing because "we find no issue presently ripe for determination." Id. at 140.

Jones' opponents attempt to tie the unaddressed issue of prior rights to statements in the protest letter. The letter, however, stated facts about the site and did not assert Native rights to the land. The matters raised were addressed by BLM and the subsequent appeals. The suggestion that the letter continued (and continues) as a protest because the facts remain unchanged is simply an assertion that, so long as appellant's homesite is present, BLM must continue to find grounds to reject it. See Jerry H. Converse, 52 L.D. 648 (1929). BLM was aware that Natives continued to object to the homesite after the remand in Jones and Jones was aware that a further challenge might be brought based upon a claim of Native rights,

but this situation is not equivalent to a pending protest requiring action by BLM. 15/

[8] For similar reasons the field investigation report cannot constitute a protest. It is an internal report of a field investigation undertaken by BLM in response to the McGill-Pearson letter. The report was a record of the factual findings on which BLM relied when it issued its notice of rejection of Jones' location notice. The recommendation in the report was made part of BLM's notice and the matter was resolved by the Jones decision. CIRI argues that the portion of the report stating that villagers of Nondalton "strongly objected to the appropriation of the village site" conveyed the villagers' protest to BLM. As a matter of law, neither the statement nor the report constitutes a protest within the meaning of the regulation so as to preclude application of the Confirmation Act. 16/ Nor could it be considered a protest of appellant's yet-to-be-filed patent application so as to preclude application of the Confirmation Act.

15/ CIRI also argues there has been a continuing protest because various documents in BLM files show BLM to have understood the homesite to be under Native protest (CIRI Posthearing Brief at 14-15). Although the documents show that BLM was aware that Natives objected to appellant's homesite, as discussed above, a protest is a document filed with BLM by a party raising objections to a pending BLM action. Internal BLM documents do not constitute a protest requiring a decision on the merits.

16/ "[T]he reference is to a proceeding against the entry and not some communication which at most is only suggestive of the propriety of such a proceeding and may never become the basis of one." Lane v. Hoglund, supra at 178 (report recommending cancellation made within 2-year period, but proceeding not ordered until after its expiration). Accord United States v. Bothwell, 7 F.2d 624, 626 (D. Wyo. 1925) ("a mere adverse report does not justify withholding a patent"); Gildner v. Hall, supra at 705 (report "not brought to knowledge or attention of the entryman" for at least 6 years "cannot be regarded or deemed a protest"). See Alfred M. Stump, 42 L.D. 566 (1913), vacating 39 L.D. 437 (1911); George Judicak, 43 L.D. 246 (1914), overruling Herman v. Chase, 37 L.D. 590 (1909).

We next consider the issuance of a receipt. Appellant admits that he has not paid or tendered his purchase price (Reply Brief on Appeal at 15), but argues that Judge Morehouse erred in rejecting his Confirmation Act claim for this reason (Statement of Reasons at 6-25). The Judge based his decision on the Board's opinions in United States v. Braniff (On Reconsideration), 65 IBLA 94 (1982), and United States v. Bunch (On Judicial Remand), 64 IBLA 318 (1982), aff'd sub nom. Bunch v. Kleppe, Civ. No. A76-115 (D. Alaska Jan. 14, 1983) (Decision on Appeal at 6).

Appellant argues that the decisions relied upon are inconsistent with the purposes of the Confirmation Act and fail to take into account changes in administrative procedures. Appellant argues that, under current procedures for patenting unsurveyed land in Alaska, payment is not required or possible until the land has been surveyed and the acreage determined, and that a survey is not ordered until after the application has been approved. Appellant points out that BLM's delay in reviewing an application also precludes application of the Confirmation Act. This, according to appellant, is contrary to the purpose of the Act identified by the Supreme Court in Stockley v. United States, supra at 540, of avoiding "delays for an unreasonable length of time--that is, for more than two years." Appellant

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fn. 16 (continued)

Some cases appear to find that a report was sufficient, but a reading of the facts reveals that the Department had acted on the report prior to the expiration of the 2-year period by suspending the application or otherwise taking official action which gave notice of the matters pending. See, e.g., United States v. Fisher, 227 U.S. 445, 448 (1913), Zwang v. Udall, 371 F.2d 634 (9th Cir. 1967) (decision ordering cancellation of entries), Neis v. Ebbe, 189 P. 417, 419 (1920); see generally United States v. Bryant, 25 IBLA 247 (1976), aff'd, Civ. No. A76-84 (D. Alaska Jan. 5, 1978).

argues that the Confirmation Act should apply beginning with the date of the application to purchase, so that, consistent with the Act's purpose, BLM is required to conduct timely review. The parties also argue about whether appellant could have or should have paid the purchase price for his land at the time he applied for patent.

Although appellant's argument has some merit, 17/ we decline to overrule our prior decisions. Our decision in Bunch quoted extensively from Stockley. The district and circuit courts had found (and the Government argued on appeal to the Supreme Court) that at the time the Confirmation Act was enacted the "receiver's receipt upon the final entry" was issued following adjudication of final proof of compliance and, for this reason, the

17/ Appellant has also provided a copy of the decision in United States v. Guild, AA-8433 (July 19, 1985). Based on an extended review of judicial and Departmental decisions addressing the Confirmation Act, the Administrative Law Judge held that Guild did not qualify because a receipt had not been issued, but suggested that it would be within the Act's purpose and prior decisions to allow the statute to apply 2 years from the date of a tender of payment of the purchase price. Id. at 10-11. If, as appellant claims, under current administrative practice the purchase price for unsurveyed lands may not be paid until after proofs have been approved and the lands surveyed, it is possible that the Department could delay acting on an application. Such delay would be contrary to the purpose the Supreme Court assigned to the statute. See Stockley v. United States, supra at 540. Paradoxically, however, it would also create a situation akin to that existing prior to 1908 which the Court refused to restore in Stockley. We need not resolve this paradox. Appellant does not claim that he tendered payment of his purchase price and, therefore, we need not address the merits of the issue.

Appellant does argue, based on Matthiessen & Ward, 6 L.D. 713 (1888), that he would have tendered payment at his peril. However, that case concerns the Government's liability for a receipt issued by a receiver who later died. The decision found that, because the payment was not required when made, it was not received pursuant to the receiver's duties so that the receiver, not the Government or the receiver's surety bond, was liable for repayment. The case has no application to receipts issued by BLM. See Public Land Administration Act, P.L. 86-649, | 204(a), 74 Stat. 506, 507 (1960); 43 U.S.C. | 1734(c) (1982).

Act should not apply until after submission and approval of an applicant's final proof. Id. at 533, 538; see Stockley v. United States, 271 F. 632, 636 (5th Cir. 1921). The Supreme Court noted that:

> The evidence shows that prior to the passage of the statute, and thereafter until 1908, the practice was to issue receipt and certificate simultaneously upon the submission and acceptance of the final proof and payment of the fees and commissions. In 1908 this practice was changed, so that the receipt was issued upon the submission of the final proof and making of payment, while the certificate was issued upon approval of the proof and this might be at any time after the issuance of the receipt. The receiver and register act independently, the former alone being authorized to issue the receipt and the latter to sign the certificate.

Stockley v. United States, supra at 538-39. Nevertheless, as noted in Henry King Middleton, Jr., supra at 29-30, the Court found that the Act applied upon issuance of a receipt for payment of the purchase price.

[9] Because a receipt is required, in Bunch the Board rejected the appellant's argument that the 2-year period began when she filed her application to purchase. United States v. Bunch (On Judicial Remand), supra at 324; see also United States v. Braniff (On Reconsideration), supra; United States v. Boyd, 39 IBLA 321, 328-29 (1979); United States v. Bryant, 25 IBLA 247 (1976), aff'd, Civ. No. A76-84 (D. Alaska Jan. 5, 1978). The requirement was not created by a Board or court decision but by an act of Congress. Just as we cannot create an exception to the Confirmation Act to preclude recognition of a right established by Congress, we cannot eliminate a congressionally imposed condition for acquiring the right. Accordingly, we reaffirm our prior decisions and affirm Judge Morehouse's conclusion that the Confirmation Act does not apply in this case.

IV

We turn next to appellant's arguments regarding the effect of ANCSA on the contest. In his posthearing brief, appellant contended that "[s]ections 4 and 22 of ANCSA, 43 U.S.C. | 1603, 1621, control the resolution of any pre-1971 aboriginal claims or claims of use and occupancy, and has in effect extinguished those claims, nunc pro tunc, as to the contestee's homesite" (Contestee's Posthearing Brief at 11). In particular, Jones argued that each of the three provisions of section 4 had extinguished the use and occupancy rights which were the basis of the contest charges, and title should be transferred to him pursuant to section 22(b) of ANCSA. The issues were addressed in Judge Morehouse's decision and were again raised on appeal (see Reply Brief at 12-14, CIRI Response on Appeal at 7-8; Appellant's Rebuttal Brief at 4-7).

Section 4 of ANCSA, 43 U.S.C. | 1603 (1982), provides:

> (a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.
>
> (b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.
>
> (c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before

any Federal or state court or the Indian Claims Commission, are hereby extinguished.

Jones' statutory arguments are: (1) compliance with the Homesite Act gave him equitable title which, as a conveyance of an interest in public land, extinguished aboriginal title under subsection 4(a); (2) the claims asserted in paragraphs 5(a) and 5(b) of the contest complaint are communal claims based on aboriginal use and occupancy and were extinguished by subsection 4(b); and (3) the contest charges are precluded by subsection 4(c) because they are either based on assertions of aboriginal use and occupancy or are based on a statute relating to Native use and occupancy (Contestee's Posthearing Brief at 12-15).

His opponents respond: (1) section 4 does not apply because the contest concerns actual use and occupancy rather than aboriginal title
(BLM Posthearing Reply Brief at 7-9); (2) section 4 does not apply to in praesenti rights granted under 25 U.S.C. | 280a (1982) (CIRI Posthearing Brief at 24-26; BLM Posthearing Reply Brief at 8; CIRI Posthearing Reply Brief at 19-21); (3) appellant does not hold equitable title and, if he does, equitable title is not a "conveyance" under subsection 4(a) (CIRI Posthearing Brief at 22; BLM Posthearing Reply Brief at 7; CIRI Posthearing Reply Brief at 17-18); and (4) "statute or treaty" in subsection 4(c) refers to prior congressional acts which explicitly recognized aboriginal title but deferred decisions concerning Native claims (CIRI Posthearing Brief at 24-26; CIRI Posthearing Reply Brief at 22). Additionally, the parties argue about the prospective and retrospective application of subsection 4(b) and

4(c) and the effect of ANCSA's cemetery site provision, 14(h)(1) (43 U.S.C. | 1613 (1982)). 18/

As indicated by the court in United States v. Atlantic Richfield Co., 435 F. Supp. 1009 (D. Alaska 1977), aff'd, 612 F.2d 1132 (9th Cir.), cert. denied, 449 U.S. 888 (1980), the provisions of section 4 must be interpreted in the context of the history of prior legislation, judicial decisions, and legislative documents which constitute its background. See id. at 1014-19. For the present case, however, the details of those events are of less concern than the district court's and circuit court's conclusions regarding the scope of the statute.

The opinions of both courts quoted two passages from the legislative history:

> 1. The section extinguishing aboriginal titles and claims based on aboriginal title is intended to be applied broadly, and to bar any further litigation based on such claims of title. The land and money grants contained in the bill are intended to be the total compensation for such extinguishment. [H.R. No. 92-523, reprinted in 1971 U.S. Code Cong. & Admin. News at 2198.]
>
> 2. It is the clear and direct intent of the conference committee to extinguish all aboriginal claims and all aboriginal land titles, if any, of the Native people of Alaska and the language of settlement is to be broadly construed to eliminate such claims and titles as any basis for any form of direct or indirect challenge to land in Alaska. [Conf. Rep. No. 92-746, reprinted in 1971 U.S. Code Cong. & Admin. News. at 2253 (emphasis in original).]

18/ Section 14(h)(1) of ANCSA authorized the Secretary to "withdraw and convey to the appropriate Regional Corporation fee title to existing cemetery sites and historical places." 43 U.S.C. | 1613(h)(1) (1982).

3435 F. Supp. at 1029, 612 F.2d at 1136. Based on these passages and its review of the statutory provisions, the district court concluded that "Congress has expressly directed that the language of the Settlement Act be broadly construed to effectuate a comprehensive settlement of all Native claims based on aboriginal use and occupancy of land in Alaska and to bar any litigation based on such claims." 435 F. Supp. at 1029. The same intent that the statute be broadly applied was also noted by the circuit court. 612 F.2d at 1137.

Within the broad scope attributed to section 4, we find that the claims of Native use and occupancy raised in the present case fall within the statute and are barred. Accordingly, we reject the argument that the statute does not apply because the case concerns issues of actual Native use and occupancy. As stated by the district court, section 4 is directed to "all Native claims based on aboriginal use and occupancy."

Some confusion over the question of whether there is a difference between aboriginal title and rights based on use and occupancy arose with the decision in Miller v. United States, 159 F.2d 997 (9th Cir. 1947).

That case concerned the compensability of Tlingit Indian possessory rights to tidal lands which were to be condemned for the construction of wharves. Id. at 998-99. In examining the basis for the rights claimed, the court stated that "whatever 'original Indian title' the Tlingit Indians may have had under Russian rule was extinguished" by the Treaty of Cession of 1867 (15 Stat. 539) by which the United States purchased Alaska from Russia.

Id. at 1001. Nevertheless, the court went on to find that the Indians held

possessory rights under statutes enacted by Congress pertaining to the occupancy and use of lands, including section 8 of the Alaska Organic Act of 1884 (ch. 53, 23 Stat. 24, 26) and section 27 of the Second Organic Act of 1900 (ch. 786, 31 Stat. 321, 330) (which are of concern in the present proceeding) and also found that such possessory rights are compensable.

Miller was rejected by the Supreme Court in Tee-Hit-Ton Indians v. United States, 348 U.S. 272, reh'g denied, 348 U.S. 965 (1955). In reference to the Alaska Organic Acts, Miller, and claims to proprietary rights to lands, the Court stated:

> We have carefully examined these statutes and the pertinent legislative history and find nothing to indicate any intention by Congress to grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress. Rather, it clearly appears that what was intended was merely to retain the status quo until further congressional or judicial action was taken. There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation. [Footnote omitted.]

Id. at 278-79. Having determined that the statutes did not grant legal rights to the land, which would be compensable if the land was later taken, the Court turned to the question of aboriginal title.

> That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed

> of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

Id. at 279.

Thus, unless recognized by Congress, "aboriginal title" is not legal title to land but merely the fact of possession. Because aboriginal title does not entail property rights, the Treaty of Cession is of no consequence. Congress is the only forum for obtaining recognition of Native claims of aboriginal title as property rights. It alone may grant legal rights to lands held by the United States. In the Alaska Organic Acts, Congress

did not recognize or grant property rights. Rather, it authorized Native possession to continue and provided protection against intrusion of Native use and occupancy by third parties. See Edwardsen v. Morton, 369 F. Supp. 1359, 1373 (D.D.C. 1973), dismissed as moot, No. 2014-71 (Feb. 16, 1977) ("rights based on aboriginal title are rights to undisturbed use and occupancy").

[10] Congress did not act to resolve Native claims of entitlement to lands until it enacted ANCSA in 1971. As can be seen from the legislative history quoted by the courts in Atlantic Richfield, Congress intended to

end all litigation on the issue of Native rights to lands based on aboriginal use and occupancy. Section 4 was intended to extinguish all forms of aboriginal title however characterized or described. In this regard there is no difference in the nature of the aboriginal title addressed by the three subsections of section 4 of ANCSA. Subsection 4(a) refers to "aboriginal title," subsection 4(b) to "aboriginal titles, if any, and claims of

aboriginal title in Alaska based on use and occupancy," and subsection 4(c) to claims "based on claims of aboriginal right, title, use, or occupancy * * * or * * * based on any statute or treaty of the United States relating to Native use and occupancy." Consistent with Tee-Hit-Ton Indians and Atlantic Richfield, the provisions of section 4 apply to abolish aboriginal title regardless of whether such title is described in terms of right, title, possession, use, or occupancy.

The subsections of section 4 do not differ as to the type of aboriginal title addressed, but do differ as to the time affected by the extinguishment. Subsection 4(a) extinguished aboriginal title as of the date of past conveyances so that, after enactment, a claim as to prior rights cannot be asserted to invalidate any conveyance. United States v. Atlantic Richfield, supra, 435 F. Supp. at 1022, 612 F.2d at 1135. Subsection 4(b) extinguished any aboriginal title existing on the date of enactment so that a claim as to such title could not be asserted in the future. Subsection 4(c) extinguished all legal claims based on claims of aboriginal title which could have been asserted at the time of enactment or were pending in any forum. Subsection (c) precludes all claims based on an assertion of aboriginal title. Aboriginal title includes claims based on use and occupancy of land. Accordingly, we reject the argument that section 4 cannot apply because the contest now before us concerns actual use and occupancy, rather than aboriginal title.

[11] Just as section 4 of ANCSA must be broadly construed to find that a claim based on aboriginal title does not survive its enactment, so also must "statute or treaty" in subsection 4(c) be construed to apply to all statutes "relating to Native use and occupancy," rather than the restricted list of the Alaska Organic Acts and similar statutes offered by CIRI. To now construe the reference to statutes and treaties in subsection 4(c) in a manner which would allow a claim based on aboriginal use and occupancy to survive would be contrary to the broad scope of the section and the Congressional intent to resolve such claims by enacting ANCSA. 19/

We agree with CIRI, however, that section 4 does not extend to vested rights acquired under

statute prior to ANCSA's enactment. Rights acquired by virtue of compliance with statutory provisions are neither claims of aboriginal title nor claims based on use and occupancy, but property rights created by Congress. See Tee-Hit-Ton Indians v. United States, supra at 278-79. Thus, the question remains whether, in the case now before us, vested rights were acquired under the missionary station provision of the second Alaska Organic Act, 43 U.S.C. § 280a (1982), or other provisions relied upon when bringing the contest charges. In other words, there remains the question of whether "there are vested rights in the former villagers or their descendants." Jones, supra at 140. 20/

19/ Native allotments based on individual use and occupancy of land were specifically addressed in ANCSA, and to the extent such rights have been preserved by ANCSA, they do not fall within the broad scope of section 4. See 43 U.S.C. |§ 1617 (1982); Aguilar v. United States, 474 F. Supp. 840, 845-46 (D. Alaska 1979).

20/ Our agreement with CIRI does not extend to the manner in which CIRI characterizes its claims. At various times it characterizes the rights derived from the Alaska Organic Acts as "vested property rights" (CIRI Posthearing Brief at 26), an "in praesenti grant" (CIRI Posthearing Reply Brief at 2, 12, 19-20), and "Native occupancy and use" which gives "a stronger claim than one based merely upon aboriginal land claims" (CIRI Response on Appeal at 8). Only two kinds of rights to land can be asserted--a property right deriving from an act of Congress (or prior sovereign authority), or a possessory right. Mere possessory control of Federal lands is trespass against the Federal title. Native occupancy (whether characterized as a possessory right granted by Congress or a continuation of occupation under claim of aboriginal title) can no longer

It also follows that subsection 4(c) bars any assertion of a claim based on prior Native use and occupancy. In United States v. Atlantic Richfield, supra, 435 F. Supp. at 1025-26, the court stated:

> The language of subsection 4(c) is clear and unequivocal. It explicitly extinguishes all claims that are based on claims of aboriginal occupancy. Claims of past trespass to lands claimed by reason of aboriginal title require as an essential element of proof a showing of aboriginal use and occupancy at some time in the past. Such trespass claims are claims "based on claims of aboriginal occupancy" and fall within the scope of the plain language of subsection 4(c). [Footnote omitted.]

This conclusion was affirmed by the Ninth Circuit, 612 F.2d at 1135-36, which held that "the Act extinguished not only the aboriginal titles of all Alaska Natives, but also every claim 'based on' aboriginal title in the sense that the past or present existence of aboriginal title is an element of the claim." Id. at 1134. Presumably, both courts were relying on the previously quoted statement of congressional purpose that the Act was to be "broadly construed to eliminate such claims and titles as any basis for any form of direct or indirect challenge to land in Alaska."

The holding in Atlantic Richfield resolved the ongoing issue of Native rights in areas selected by the State of Alaska for which the State had issued oil and gas leases. In Edwardsen v. Morton, supra, Native villages

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fn. 20 (continued)
be asserted as the basis of any legal claim. The question of whether the Alaska Organic Acts granted property rights is not different from the question whether the Acts made an "in praesenti grant" of property rights. The term "in praesenti, which means 'in the present' is a Latinism wholly without merit." Garner, A Dictionary of Modern Legal Usage 300 (Oxford U. Press 1987). In this regard both sides err when arguing whether ANCSA extinguished and barred claims based on vested rights (see Reply Brief at 14, 20).

challenged the State's title to the selected lands and claimed compensation for trespass by the oil and gas lessees. The court concluded that the Natives' aboriginal title to the land gave them a right of undisturbed use and occupancy (id. at 1373) and that, for this reason, the land was not "vacant, unappropriated, and unreserved" under the Alaska Statehood Act so that tentative approvals of the selections by the Department were void when given (id. at 1375). The court further found that by extinguishing aboriginal rights with the enactment of ANCSA, Congress had retroactively validated the state selections and their tentative approval, defeating the plaintiff's claims to ownership. Id. at 1377-78. Nevertheless, the court held that claims of trespass and breach of fiduciary duty survived as accrued causes of action. Id. at 1379. Atlantic Richfield addressed the claims asserted in Edwardsen, with the Government prosecuting the trespass claims on behalf of the Natives. Finding ANCSA to have extinguished claims based on claims of aboriginal occupancy, the Atlantic Richfield courts rejected the trespass claims and, accordingly, dismissed them.

Native actions against the United States for the taking of legal claims by section 4 of ANCSA were addressed by the Court of Claims in Inupiat Community of the Arctic Slope v. United States, 680 F.2d 122 (Ct. Cl.), cert. denied, 459 U.S. 969 (1982). The court recognized that the logic of Atlantic Richfield was simply that "since the Settlement Act extinguished the aboriginal title * * * retroactively to the date of the patents and leases, the subsequent entries thereunder necessarily were not trespasses upon any protectible interest the Eskimos had." Id. at 127. The court also rejected the claim that lands not covered by Federal patents and

state leases had been taken, stating that when Congress extinguished aboriginal title "it terminated not only the Inupiats' title but any claims based upon that title." Id. at 129.

[12] Just as the claims of past trespass and taking discussed above were claims based upon a claim of aboriginal title, in the present case the assertion that appellant's homesite is invalid because of prior Native use and occupancy of the land is a claim based on a claim of aboriginal title. As the testimony at the hearing makes clear, such a claim requires a showing of use and occupancy at some time in the past, in particular between the time Kijik village was abandoned and the date appellant located his homesite. Accordingly, this assertion is barred by subsection 4(c).

Nor does it matter that the assertion may be that the use and occupancy was protected by the Alaska Organic Acts. While Native occupancy was indeed protected by the Acts, that protection was extended by statutes "relating to Native use and occupancy," and, in accord with Atlantic Richfield, a claim that the occupancy of the land was protected cannot serve as the basis for another claim. Thus, an assertion that Natives had occupied the land included in appellant's homesite under protection of the Alaska Organic Acts cannot serve as the basis for a further assertion that the land was unavailable and appellant's homesite was therefore invalid. Such claims are trespass claims. When Congress extinguished aboriginal title, it terminated all claims based upon such title. Inupiat Community of the Arctic Slope v. United States, supra. Accordingly, we find that subsection 4(c) precluded bringing those contest charges which asserted that appellant's notice of

location and application are invalid because the land was used or occupied by Natives at the time of location. 21/

Accordingly, we hold that, to the extent the contest charges challenge appellant's homesite location and application because the land was used and occupied by Natives and therefore unavailable, the charges were precluded by subsection 4(c) of ANCSA. To the extent the charges concern vested rights acquired under statute prior to appellant's homesite location, they may represent proper allegations. Determining whether the charges raised a proper issue requires consideration of the specific statutes relied on at the hearing and evidence of record which would show that rights had been acquired under them. We consider this matter in the next section.

Having resolved the central issues concerning section 4 of ANCSA, the two remaining issues can be readily addressed. As pointed out by BLM and CIRI, appellant's arguments that he held a "conveyance" under subsection 4(a), had made a "lawful entry" under subsection 22(b), and is entitled to a patent presume that his homesite location was valid because there were no prior rights making the land unavailable. As explained below, neither subsection 22(b) nor 4(a) grants a separate right to obtain a patent.

Subsection 22(b) directs the Secretary "to promptly issue patents to all persons who have made a lawful entry on the public lands in compliance

21/ Although not explicitly analyzed, the conclusion that section 4 of ANCSA bars raising an issue based on Native occupancy which may have existed at the time an action was taken has been relied on by the Board in a number of prior decisions. See Bristol Bay Native Corp., 71 IBLA 318 (1983); State of Alaska, 41 IBLA 315, 323, 86 I.D. 361, 365 (1979); Louis P. Simpson, 20 IBLA 387, 393 (1975).

with the public land laws * * * and who have fulfilled all requirements of the law prerequisite to obtaining a patent." 43 U.S.C. | 1621(b) (1982). From the wording of the statute it is clear that any right appellant may have to obtain a patent depends upon his compliance with the requirements of other laws. The statute simply instructs the Secretary to resolve entries made under the public land laws prior to conveying lands to Native village and regional corporations. See Lee v. United States, 629 F. Supp. 721, 729-32 (D. Alaska 1985), aff'd, 809 F.2d 1406, 1411 (9th Cir. 1987).

Nor does subsection 4(a) grant a right to a patent. Rather, it provides that prior conveyances of land and interests in land "shall be regarded as an extinguishment of the aboriginal title thereto, if any." 43 U.S.C. | 1603(a) (1982). We need not resolve the issue of whether,
prior to ANCSA's enactment, appellant received a "conveyance" or "inter-
est" in land within the meaning of subsection 4(a) which would extinguish aboriginal rights. All Native title and rights which may have existed
were extinguished by subsection 4(b), and, under subsection 4(c), appellant's homesite cannot now be challenged on the basis of any right to occupy the land held by Natives prior to ANCSA's enactment. Accordingly, we need not decide whether such rights as may have existed were also retroactively abolished by subsection 4(a).

V

Thus, we arrive at the question whether other parties held vested rights to the Kijik site on the date appellant located his homesite (see

Tr. 21-23). As further detailed at the outset of the hearing (Tr. 13-16, 26-27) and in BLM's posthearing briefs, the charges in the contest com-plaint were supported by claims that rights were held by the Russian Orthodox Diocese of Alaska, members of the St. Nicholas Church of Nondalton, and the Nondalton descendants of the villagers of Kijik which originated with section 8 of the Act of May 17, 1884, supra, and section 27 of the Act of June 6, 1900, (ch. 786, | 27, 31 Stat. 321, 330, codified at 25 U.S.C. | 280a (1982)) (BLM Posthearing Brief at 3-9).

These Acts are commonly referred to as the Alaska Organic Acts. The first statute was enacted as part of the legislation providing a civil government for the District of Alaska. It stated:

> [T]he Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress. * * * [T]he land not exceeding six hundred and forty acres at any station now occupied as mission-
> ary stations among the Indian tribes in said section, with the

> improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action by Congress.

Act of May 17, 1884, supra. The second statute made more detailed provisions for the civil government, both continuing and superseding the prior legislation. The relevant provision stated:

> The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use or occupation, and the land, at any station not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in the section, with the
>
> improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which the missionary stations respectively belong, and the Secretary of the Interior is hereby directed to have such lands surveyed in compact form as nearly as practicable and patents issued for the same to the several societies to which they belong * * *.

Act of June 6, 1900, supra.

Early Departmental decisions concluded that the 1884 Act required recognition of rights based on actual use and occupancy, although a few decisions differed as to the effect those rights might have when the United States acted to withdraw or reserve the land. 22/ Apparently because the statute referred to future Congressional legislation "under which such persons may acquire title to such lands," several courts also suggested that the statute granted a right to acquire title to the land. In Russian-American Packing Co. v. United States, 199 U.S. 570, 576 (1905), the Supreme Court commented:

> It is quite clear that this section simply recognized the rights of such Indians or other persons as were in possession of lands at the time of the passage of the act, and reserved to them the power to acquire title thereto after future legislation had been enacted by Congress.

22/ Compare Baranof Island, 36 L.D. 261, 263 (1908) ("protected as against any attempted subsequent disposition or reservation of the land"), with Alaska Commercial Co., 39 L.D. 597, 598 ("acquired by such occupancy no vested right against the United States" "inoperative to prevent the United States from reserving the land for its own uses"), vacated on other grounds, 41 L.D. 75 (1912). The difference was resolved by decisions holding that possessory rights did not preclude Government reservation or withdrawal of land, though a reservation could except prior possessory rights. See Pan Alaska Fisheries, Inc., 74 IBLA 295, 300-302 (1983).

See also Bennett v. Harkrader, 158 U.S. 441, 445 (1895); Young v. Goldsteen, 97 F. 303, 308 (D. Alaska 1899).

The statute was equally understood to protect use and occupancy of land by missionary stations. See Opinion, 25 L.D. 480, 483 (1897); Instructions, 22 L.D. 330 (1896). The words "now occupied" in the 1884 statute were understood to refer to the date of the statute's enactment and "hence only reserve and protect such land as was then used as missionary stations." 25 L.D. at 484. The interpretation of the provision to apply only to land actually occupied or used as of its date of enactment was consistent with other Departmental decisions, including decisions regarding Native occupancy. See, e.g., Wrangell Townsite, 37 L.D. 334, 337 (1908); Naval Reservation, 25 L.D. 212, 214-15 (1897); A. S. Wadleigh, 13 L.D. 120 (1891). Following enactment of the missionary station provision in the Second Alaska Organic Act, the Department issued regulations allowing "any organized religious society that was maintaining a missionary station in the district of Alaska on June 6, 1900," to apply for patent to land actually used and occupied as of that date. Regulations, 32 L.D. 424, 446 (1904).

These early Departmental and judicial decisions are consistent with the later judicial decisions discussed in the preceding section which reviewed the Alaska Organic Acts in relation to the issue of aboriginal rights. However, the statements in the early decisions regarding a right or power to acquire title are in clear conflict with both the courts' analysis of ANCSA in Atlantic Richfield and the Supreme Court's decision in Tee-Hit-Ton Indians. As previously quoted, in response to arguments that the Alaska

Organic Acts represented congressional recognition of Native possessory rights sufficient to be compensable as a taking, the Court stated that it found "nothing to indicate any intention by Congress to grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress." Id. at 278. Rather, the Court stated, the provisions were intended "merely to retain the status quo until further congressional or judicial action was taken." Id. As a result of this analysis of the Alaska Organic Acts, the earlier statements indicating that those Acts granted a right to obtain title must be regarded as dicta.

Legislation was enacted to permit the conveyance of title to Alaskan land in a variety of circumstances, including missionary stations and the Native Allotment Act of 1906. However, Congress was not required to provide for the transfer of title. Nor can the provisions of the Alaska Organic Acts be regarded as a commitment by Congress to do so. Consistent with the Supreme Court's ruling in Tee-Hit-Ton Indians, by enacting ANCSA Congress did not resolve the issue of Native claims by providing for the transfer of lands actually occupied, but opted to authorize the conveyance of large parcels selected by village and regional corporations. See Wisenack Inc. v. Andrus, 471 F. Supp. 1004, 1009 (D. Alaska 1979). At the same time Congress extinguished all Native claims based on use and occupancy.

[13] Consistent with ANCSA, Tee-Hit-Ton Indians, and Atlantic Richfield, we conclude that, while the Alaska Organic Acts protected Native and missionary station use and occupancy of land as of their dates of enactment, neither Act granted a right to obtain title or vested other property rights

in the occupants. Neither statute granted vested property rights to the Natives living at Kijik on May 17, 1884, and June 6, 1900, or to the Russian Orthodox Diocese of Alaska, or St. Nicholas Church of Nondalton.

The only basis for a contrary conclusion offered by the parties is found in Bolshanin v. Zlobin, 76 F. Supp. 281 (D. Alaska 1948) (Tr. 16; BLM Posthearing Brief at 4; CIRI Posthearing Reply Brief at 11, 19). That suit was brought by church members against their priest to recover possession of the church building and land patented to the archbishop in 1914. The plaintiffs claimed title based on the Treaty of Cession. The court rejected this claim, finding, on the basis of early Departmental decisions, that the Treaty of Cession had "merely recognized a possessory right in the land" occupied by the church to which "the title was imperfect and incomplete * * * until the political department took further action." Id. at 287. "This," the court said, "was done with the passage of the act of June 6, 1900" and "[i]t was not until then that the title could be perfected." Id.

Jones' opponents claim that the court found the 1900 Act to have granted a vested or "in praesenti" right to lands. We do not think so. The court did not say that the "imperfect and incomplete" title became perfected upon enactment of the 1900 provision but that with the enactment "the title could be perfected." Consistent with this difference, the Bolshanin court found that the patent issued to the archbishop was not "merely confirmatory of a previously existing complete title, but was the grant of a fee simple title of the land described therein." Id. at 288.

Because the Second Alaska Organic Act did not grant the Kijik Natives, the Russian Orthodox Diocese of Alaska, or the local church at Kijik vested property rights, it follows that neither the Nondalton descendants of the Kijik villagers nor the Russian Orthodox Church (either in its own right or as successor to the rights of the church at Kijik) held vested rights to the land at the time Jones made his homesite location. As the cases previously discussed make clear, the Second Organic Act granted only a right of continued undisturbed occupancy. As analyzed in the preceding section, any claim to a right of occupancy held by Alaskan Natives was extinguished by section 4 of ANCSA, and a claim based on prior occupancy cannot be asserted under subsection 4(c).

Section 4, however, does not apply to extinguish any occupancy right which may have been held by the Russian Orthodox Church at the time Jones located his homesite or bar claims based on such occupancy. As established in early Departmental cases, such right would apply only to lands actually used and occupied by the church on June 6, 1900.

Although raised by the complaint, the decision on appeal did not reach the issue of rights held by the Russian Orthodox Church. The parties have argued the question of continued use and occupancy by the church on two grounds. First, BLM argues that under the theological principles of the Russian Orthodox Church there could be no intent to abandon the church's right to the property (BLM Posthearing Brief at 16-17; BLM Answer at 2-3). Second, BLM argues that the church has continued actual occupancy of the land by virtue of the presence of the remains of the church and cemetery

area. CIRI raises a similar argument of Native occupancy of the site as a missionary station (see CIRI Posthearing Brief at 18-19; BLM Posthearing Reply Brief at 10-11; BLM Answer at 4-6; CIRI Response Brief at 3-5).

[14] The first argument errs by assuming actual intent to abandon is required. The case before us does not concern fee title to property or a vested property right acquired by the church pursuant to congressional legislation. Rather, it concerns a protected right of occupancy, and the question is whether the church continued to exercise its right or had ceased to use and occupy the land. This difference is the same as that previously analyzed and applied to Native occupancy rights arising under the Alaska Organic Acts for claims made under the Native Allotment Act of 1906. In United States v. Flynn & Orock, 53 IBLA 208, 238, 88 I.D. 373, 389-90 (1981), the Board held:

> [A]bsent the filing of an application for allotment, cessation of use or occupancy for a period of time sufficient to remove any evidence of a present use, occupancy or claim to the land, terminated all protected rights under both the allotment and permissive occupancy statutes and restored the land to its original status of vacant and unappropriated land, regardless of the existence of any "intent" to permanently abandon such use or occupancy. Such prior use or occupancy does not serve as a bar for the initiation of rights in the lands by other individuals. [Emphasis supplied, footnote omitted.]

Accordingly, we reject the parties' first argument because it has no application to the issue now before us. 23/ For similar reasons we will not

23/ As argued in the briefs, to address the intent of the Russian Orthodox Church, or use and occupancy based upon Native religious beliefs, would raise threshold questions regarding the First Amendment. Under United States v. Flynn & Orock, supra, there is no need to consider these matters.

discuss the related argument concerning the legal standards applicable to the abandonment of cemeteries. The case before us concerns public, not private land. There is no question of dedication of land to a public purpose, and the issue of use and occupancy does turn upon the intent but upon the actions of the Russian Orthodox Church.

The question whether the Russian Orthodox Church continued to exercise its right of occupancy is controlled by the rulings of the Alaska courts. Those courts have commonly followed the common law rule, that in order to assert a possessory right:

> the use or occupancy which gives rise to such a right must be notorious, exclusive and continuous, and of such a nature as to leave visible evidence thereof so as to put strangers upon notice that the land is in the use or occupancy of another, and the extent thereof must be reasonably apparent.

United States v. 10.95 Acres of Land in Juneau, 75 F. Supp. 841, 844 (D. Alaska 1948); see United States v. Alaska, 201 F. Supp. 796 (D. Alaska 1962); United States v. Alaska, 197 F. Supp. 834 (D. Alaska 1961); United States v. Libby, McNeil & Libby, 107 F. Supp. 697 (D. Alaska 1952). The Department has frequently relied upon the standard provided by these decisions. See, e.g., United States v. Flynn & Orock, supra at 227; Herbert H. Hilscher, 67 L.D 410, 416 (1960).

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fn. 23 (continued)
We believe our approach to be consistent with the recent decision of the Supreme Court in Lyng v. Northwest Indian Cemetery Protective Association, 56 L.W. 4292 (Apr. 19, 1988).

The most relevant evidence in the record regarding the church's claim to the land is found in the deposition of Reverend Michael Oleksa, the local priest for the area including Kijik (Dep. at 3). He visits Nondalton several times a year, staying 3 or 4 days each time (Dep. at 6, 47). He was, however, unable to testify that he or other representatives of the church had actually used the church at Kijik since 1909, when the village was abandoned (see also Tr. 87, 91, 114). His inability to do so was due, in part, to the lack of locally available church records for the period prior to the late 1930's (Dep. at 42, 47-48; but cf. Tr. 81, 84, 93, 192-93). He had "visited" the site only by way of a low-altitude fly over (Dep. at 11-12, 35). Oleksa also testified that the bishop's permission (or at least notification that the church and items used in worship were being moved) would have been required to move the place of worship from Kijik to Nondalton (Dep. at 14-15).

Oleksa did maintain that the church remained interested in the site and that he had written BLM to present the church's objections to having the land used for any purpose other than a graveyard (Dep. at 28-29). A copy of this letter, dated October 16, 1975, appears as an exhibit to the deposition. It states that, on behalf of the members of the church at Nondalton "as well as the Russian Orthodox Diocese of Alaska," the author wished to assert the claim of the Orthodox Church of St. Nicholas "to the church building and Orthodox burial ground at Kijik" (Dep. Exh. at 3).

The purpose of the missionary station provision of the Second Alaska Organic Act was to allow those using land for missionary stations to continue their occupancy protected from encroachment by others. The Act

further directed the Secretary to survey and transfer title to such lands. Upon its enactment, the Department established procedures by which religious organizations could apply for and receive title. Nothing in the record suggests that any official of the Russian Orthodox Church visited the Kijik site, expressed any interest in obtaining title to it, or did anything to maintain its right of occupancy until Reverend Oleksa directed his letter

to BLM in 1975. The only evidence is to the contrary (see Tr. 248-49).

Early decisions addressing the occupancy provision of the Alaska Organic Acts indicate that the Russian Orthodox Church actively pursued

its interest in lands on which it maintained churches. See Opinion, 25 L.D. 480 (1897); Instructions, 22 L.D. 330 (1896). The patent in dispute in Bolshanin v. Zlobin, supra, was issued in 1914. Following abandonment of the village of Kijik, the church was still entitled to file an application for patent based on its use and occupancy as of June 6, 1900. Later, it could also have requested that the area be surveyed and withdrawn under PLO 2171. However, we find no evidence that the church took action to preserve its occupancy right so as to make the land unavailable for appellant's homesite location.

[15] Nor do we believe the remains of the church and the presence of graves to be sufficient to establish "notorious, exclusive, and continuous" use under the concepts of public land law so as to give notice that the land is used and occupied. Over the years, numerous sites in Alaska, as in the West, were occupied by groups of Natives or settlers as homesites or townsites. When deaths occurred, land was designated as a cemetery. As the

population increased and visits by the clergy became more frequent, churches were constructed. Many settlements grew and title to the land was obtained under the public land laws. Others were abandoned and title remained in the United States. When subsequent settlers came upon the land and saw the remains of buildings or other evidence left by the former occupants, they knew that the land had once been occupied, but the remains they observed were evidence of prior rather than present use and occupancy. If they recognized gravesites, they would likely understand that they should be left undisturbed. Nothing in the public land laws, however, suggests that the graves would affect the rights of subsequent settlers or give the descendants of those buried a right to the land. Similarly, in the present case the remains of the church and the graves, as they existed when Jones filed his location notice, were not sufficient to show continued use and occupancy by the Russian Orthodox Church or to put appellant on notice of occupancy by the Church. Cf. Pedro Bay Corp., 78 IBLA 196 (1984); United States v. Flynn & Orock, supra; Herbert H. Hilscher, supra.

Having ruled upon the issues presented, we turn to the conclusions of Administrative Law Judge Morehouse in the decision on appeal. We believe the factual conclusions of the Judge appearing on pages 4-5 of the decision are generally supported by the record. 24/ However, three of the findings clearly led to the legal conclusions quoted earlier in this opinion which,

24/ The dates concerning the history of Kijik village set forth by the Judge differ from those stated earlier in this opinion. The Board's recitation relies on the written authorities cited. Other portions of the record provide different dates. Nothing of consequence to this opinion turns on those dates. Outside the context of this case, such dates are,
of course, subject to change as archaeologists and historians further research the history of Alaska.

based on our analysis of the law, must be reversed. The fourth, fifth, and sixth findings listed in the decision concern Native use of the land and their attitudes toward it; the Russian Orthodox Church's attitude toward the site and its lack of intent to abandon it, and Jones' knowledge of Native concerns about the site (Decision at 4-5). These findings led to the conclusion that the land within the homesite was occupied and claimed by Natives, that Jones knew of their claims, and that the land was not available for entry (Decision at 6).

After enactment of section 4 of ANCSA, the conclusion that the land was "occupied and claimed by Natives of Alaska" in 1966, 1969, and 1976 cannot serve as the basis for a conclusion that "the land was unavailable for entry as a homesite claim." Contrary to assertions made by CIRI, the Alaska Organic Acts provided Alaskan Natives only a right to occupy lands under claim of aboriginal title pending congressional resolution of the question of Native rights. After enactment of section 4 of ANCSA, such prior Native use and occupancy cannot serve as a basis for a conclusion that the land in appellant's homesite was unavailable in 1966 or in 1969. Similarly, a conclusion that the land was unavailable in 1976 requires a determination that the land was occupied and claimed under aboriginal title as of that date. Such title to the land could not exist after ANCSA.

Judge Morehouse conceded that appellant was "probably" correct that section 4 extinguished the Native claims of the Nondalton Natives to the land within the homesite, but concluded that "this would not have any bearing on the validity of Jones' homesite claim" because ANCSA did not reach

back and automatically turn previously unavailable land into available land and retroactively validate what was otherwise an invalid homesite claim" (Decision at 7). As we have analyzed the statute, the Judge correctly concluded that section 4 would not retroactively validate appellant's homesite location if it was previously invalid because the land was unavailable. If the homesite had been challenged on this basis prior to ANCSA's enactment, it would not have been revived by the statute. However, no such determination was made prior to ANCSA's enactment.

ANCSA precluded a subsequent determination of whether the land was previously unavailable due to Native use and occupancy. The Act did not retroactively validate appellant's homesite, but prevented a determination that it was invalid as a result of prior Native use and occupancy. After ANCSA, decisions concerning prior use and occupancy were neither necessary nor possible. There was no need to protect such occupancy in order to make the required conveyances to Native regional and village corporations. All lands in Alaska were withdrawn in 1969 and the withdrawals were continued under ANCSA. See 43 U.S.C. || 1610, 1616(d) (1982). As a consequence, in the 1970's most Alaska lands were unavailable for entry under the public land laws. No new rights could be acquired until the process of transferring title to individuals, the State of Alaska, and village and regional corporations was completed, or sufficient land was designated for that purpose. The withdrawn status of the land, not continued use and occupancy or the Departmental regulation, prevented the acquisition of additional rights.

VI

Appellant asserts he has a claim of right by virtue of his compliance with the Alaska Homesite Act. BLM and CIRI have opposed his claim based on Native use and occupancy at the time he located his homesite. We have determined that the latter claims are barred by ANCSA. Congress intended to end future litigation regarding the extent and nature of aboriginal title and all litigation involving issues of Native use and occupancy of lands prior to ANCSA. Accordingly, we find Judge Morehouse erred in ruling on the question of Native use and occupancy of the Kijik site and reverse his decision. We additionally hold that the record does not show that the Russian Orthodox Church preserved its right to occupy the land it used and occupied as of June 6, 1900.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case remanded to permit final adjudication of Jones' application to purchase.

R. W. Mullen
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge